THE "O. SAMBAUR" (No. 1) WINMORE CORPORATION LTD. v. THE OWNER OF L.S.T. "O. SAMBAUR"

[O. C. J. (Whyatt C.J.) February 11, 1958]

[Singapore — In Rem Admiralty Suit No. 13 of 1957]

Practice and Procedure — Action in Rem — Admiralty Procedure Rules — Writ addressed to the owner of the ship instead of to owner of the ship and parties interested in ship — Whether omission irregularity or nullity — Whether R.S.C., O. 63 applicable.

This was an application by an intervener to set aside writ *in rem* issued by the plaintiffs against the defendant on the ground that it was a nullity because it was addressed to "The Owner of L.S.T. O. Sambaur" instead of to "The Owner of L.S.T. O. Sambaur and parties interested in the ship".

Held: the writ was properly issued against the owner of the L.S.T. "O. Sambaur" as defendant but it was improperly addressed owing to the omission from the citation of the words "parties interested in the ship", but this omission was an irregularity and not a nullity, and accordingly Order 63 of the R.S.C. applied and an amendment might be allowed.

Amendment allowed. Motion dismissed.

Cases referred to :—

(1) *Institute of Patent Agents v. Lockwood* (1894) A.C. 347.

(2) *Minister of Health v. The King, ex parte Yaffe* (1931) A.C. 494.

(3) *Craig v. Kanssen* (1934) 1 K.B. 256.

(4) *Fry v. Moore* 23 Q.B.D. 395, 398.

ACTION IN REM.

The following facts, so far as they are relevant to the present proceedings, are taken from the judgment of the learned Chief Justice. On December 28, 1957 the Winmore Corporation Ltd. issued a writ *in rem* against the Owner of L.S.T. "O. Sambaur" claiming $109,616.96 for bunkers and other necessaries supplied to the vessel during the previous twelve months. The writ was served on December 28, 1957 by affixing a copy of the writ to the main mast of the ship and immediately afterwards, the Admiralty Marshal seized the vessel by virtue of a warrant of arrest. A few days later on January 3, 1958, Lucian Bernaroya, the intervener in the present proceedings, obtained judgment in default of appearance against Alexis Fournier des Corats, the owner of L.S.T. "O. Sambaur", for the sum of $281,017 and on January 4, 1958 a writ of seizure and sale was issued from the Registry of the Supreme Court at the instance of the judgment creditor, Lucian Bernaroya, and on the same day L.S.T. "O. Sambaur" was attached by the Sheriff by virtue of the writ of seizure and sale. On January 20, 1958 Lucian Bernaroya filed an affidavit in the present proceedings claiming an interest in the action brought by the Winmore Corporation Ltd. against the Owner of the L.S.T. "O. Sambaur" and on January 21, 1958 entered a conditional appearance as an intervener without prejudice to an application to set aside the writ. The value of the vessel, in her then condition, was apparently insufficient to meet the plaintiffs' claim for $109,116.96 for necessaries and Lucian Bernaroya's judgment debt for $281,017 and, since the plaintiffs, if they proceed to judgment, would become secured creditors retrospectively as from the date of the arrest of the vessel on December 28, 1957, the question whether the writ should be set aside as a nullity was obviously one of considerable practical importance.

M. Karthigesu for the plaintiffs.

T. G. Dunbar for the intervener.

Cur. Adv. Vult.

Whyatt C.J. : — This is an application by an intervener, named Lucien Bernaroya, to set aside a writ *in rem* issued by the plaintiffs, the Winmore Corporation Ltd. against the defendant, the Owner of L.S.T. "O. Sambaur", on the ground that it is a nullity because it was addressed to "The Owner of the L.S.T. O. Sambaur" instead of to "The Owner of the L.S.T. O. Sambaur and parties interested in the ship".

[His Lordship then briefly summarised the facts relevant to the proceedings as set out above and said that the question whether the writ should be set aside as a nullity was obviously one of considerable practical importance, and continued :]

The rules governing the procedure in Admiralty suits in Singapore are to be found partly in the Admiralty Procedure Rules and partly in the Rules of the Supreme Court. The former were made by the Judges of the Supreme Court of the Straits Settlements under section 7 of the Colonial Courts of Admiralty Act 1890 which provides that any rules made thereunder shall have full effect as if enacted in the Act. The relevant rules are Rule 9(1) and Rule 30 which read as follows :—

"9(1) In suit *in rem* the writ of summons shall be addressed to the owner and other persons interested in the ship, cargo freight, or other property as the case may be.

30. The Forms in force in the Admiralty Division of the High Court in England shall be followed subject to such variations and alterations as may be necessary".

The Form of the Writ of Summons in an Admiralty Action *in rem* in England is to be found at page 2520 of the *Annual Practice* 1957 and it provides that the writ shall be addressed to "the owners and parties interested in the ship or vessel". It is clear, therefore, that the writ, in order to comply with the Admiralty Procedure Rules, should have been addressed to "The owner of L.S.T. 'O. Sambaur' and parties interested in the ship" and not merely to "The owner of L.S.T. 'O. Sambaur'."

Now there is in the Singapore Rules of the Supreme Court, as there is in the English Rules of the Supreme Court, a special Order dealing with the effect of non-compliance with Rules of the Supreme Court. It is Order 63 and is almost identical in its wording with Order 70 of the English Rules; it reads thus :—

"Non-compliance with any of the provisions of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void, unless the Court or a Judge so directs, but such proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with, in such manner and upon such terms as the Court or Judge thinks fit."

It is well-established that this curing Order, if I may so term it, may be invoked where the proceedings are irregular but not where they are a nullity, and the crux of the matter in the present proceedings is to decide whether the omission of the words "and parties interested in the ship" after the words "the owner of L.S.T. 'O. Sambaur'" makes the writ a nullity.

Before turning to deal with this question, I will refer to a preliminary objection raised by counsel for the intervener that Order 63 cannot be invoked to cure non-compliance with the Admiralty Procedure Rules, even when the non-compliance is a mere irregularity, because of the special status which it is contended should be attributed to these Rules. It is provided by Rule 8 of the Admiralty Procedure Rules that "subject to the provisions of these Rules every Admiralty suit . . . . . shall be . . . . . dealt with . . . . . in conformity with the provisions of the Civil Procedure Ordinance as if such suit was an ordinary civil suit . . . . . " and as the Civil Procedure Ordinance has since been replaced by the Supreme Court Rules, the position now is that every Admiralty suit is governed by the Admiralty Procedure Rules and, subject to those Rules, by the Supreme Court Rules which, of course, include Order 63. Nevertheless it was contended that Order 63, although it might cure an irregularity arising from non-compliance with some other Supreme Court Rule, could not cure an irregularity arising out of non-compliance with an Admiralty Procedure Rule because the Admiralty Procedure Rules are made under section 7 of the Colonial Courts of Admiralty Act 1890 which provides that the Rules "shall have full effect as if enacted in this Act." It was argued that this phrase gives the Admiralty Procedure Rules a special status which places them beyond the reach, so to speak, of ordinary subordinate legislation and as Order 63 falls into the latter category, it cannot be invoked to cure non-compliance with the Admiralty Procedure Rules. Counsel for the intervener was unable to cite any authority in support of this proposition which I do not find surprising as it is in my judgment based upon a misconception of the scope and purpose of the phrase "shall have full effect as if enacted in this Act." This phrase was at one period frequently employed by Parliamentary draftsmen to prevent, if possible, subordinate legislation being challenged in the Courts on the ground that it was *ultra vires* but I believe I am right in saying that after the publication of the Report of the Royal Commission on Ministerial Powers, the practice was changed and it no longer appears in modern statutes. The meaning and effect of this kind of provision was considered by the House of Lords in the well-known case of the *Institute of Patent Agents v. Lockwood*[1] which was further commented upon and explained in the case of the *Minister of Health v. The King, Ex parte Yaffe*[2]. In the former case the Board of Trade were empowered to make such rules as they thought expedient for the purpose of the Patents, Designs and Trade Marks Act, and such rules were to be "of the same effect as if they were contained in the Act". It was pleaded that certain rules imposing penalties on persons who called themselves patent agents who were not registered were *ultra vires* but the House of Lords held that the provisions as to the rules being of like effect as if they had been enacted in the Act, precluded inquiry by the Courts as to whether the rules were *ultra vires* or not. This view was qualified to some extent in *Yaffe's* case where it was held that although rules made under such powers speak as if they were contained in the Act, the Courts can nevertheless inquire whether they conflict with the Act, and if they do conflict, then they give way to the Act.

It will be seen therefore that an inquiry into the meaning and effect of the phrase "as if enacted in the Act" may be important if any question should arise as to whether subordinate legislation is *ultra vires* the principal Act. But no such question arises in regard to the Admiralty Procedure Rules and in my opinion the phrase has no relevance when considering the construction to be placed upon the Admiralty Procedure Rules which, *ex concessis*, are *intra vires*. As I have said, the code of procedure governing Admiralty suits consists partly of the Admiralty Procedure Rules and partly of the Rules of the Supreme Court. It must be construed as a whole, and if this is done, it is plain that the curing provisions of Order 63 are applicable to all the provisions of the code, whether they derive from the Admiralty Procedure Rules or from the Supreme Court Rules. I might add that this corresponds to the position in England where the curing provisions of Order 70 apply equally to the rules governing Admiralty suits as they do to suits brought in any other Division of the High Court.

I turn now, therefore, to consider whether the mistake in this writ can be cured by Order 63 and this depends, as I have already said, on whether the omission of the words "and parties interested in the ship" is an irregularity or whether it makes the writ a nullity. As Lord Greene said in *Craig v. Kanssen*[3] the line between a nullity and an irregularity is difficult to draw but where a person is entitled to have a proceeding set aside *ex debito justitiae*, it can properly be described as a nullity. Now in an Admiralty writ *in rem* the persons named in the writ as defendants are "The owners of ship . . . . . " and no mention is made of "parties interested in the ship" except in that

part of the writ which deals with the persons to whom the writ is to be addressed. The "parties interested in the ship" (who may be mortgagees, salvors, or other persons possessing maritime or statutory liens) are entitled to intervene in the suit on filing an affidavit of interest but until they do, they have no status in the proceedings and the action proceeds in the ordinary way against the named defendants, namely, "The owners of the ship . . . . .". But if the omission of the words "parties interested in the ship" makes the writ a nullity, as counsel for the intervener contends, the defendants could have it set aside *ex debito justitiae*, even in cases where there was no one interested in the ship except themselves. On the other hand, if the omission of the words "parties interested in the ship" does not make the writ a nullity, the subsequent proceedings would be valid, and the "parties interested in the ship", if there were any, would be entitled to intervene on filing an affidavit of interest notwithstanding the irregularity. If it be said that they would not know they were entitled to intervene if the words "parties interested in the ship" were omitted from the writ, the answer is that as soon as the writ was served by nailing it to the mast of the vessel, they would know, indeed all the world would know, since nailing a writ to the mast is notice to the world that the ship was being proceeded against *in rem*, and therefore they would know that their interests in the *res* were impleaded. In my opinion no mischief need result from treating an omission of this kind as an irregularity and certainly none has occurred in the present case.

In arriving at my conclusion that this is an irregularity and not a nullity, I have borne in mind the words of Lindley L.J. in *Fry v. Moore*[4]. "I shall not attempt" he said, "to draw an exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served . . . . .". So, in the present case, the correct view, in my judgment, is that the writ was properly issued against the Owners of the L.S.T. "O. Sambaur" as defendants but it was improperly completed owing to the omission from the citation of the words "parties interested in the ship." I am of the opinion, therefore, to quote Lindley L.J.'s words, "that this proceeding was rather an irregularity than a nullity" and accordingly in my view Order 63 applies and an amendment may be allowed. I, therefore, order that the motion be dismissed and that the writ be amended by inserting in the citation the words "and the parties interested in the said ship" after the words "The Owner of L.S.T. 'O. Sambaur' lying at Singapore Harbour, Singapore."

Motion dismissed.

Solicitors: *Allen & Gledhill; Murphy, Dunbar & Chung.*

THE "O. SAMBAUR" (No. 2) WINMORE CORPORATION LTD. v. THE OWNER OF L.S.T. "O. SAMBAUR"

[O. C. J. (Whyatt C.J.) April 14, 1958]

[Singapore — In rem Admiralty Suit No. 13 of 1957]

Practice and Procedure — Action in Rem — Entry of appearance and caveat by defendant after judgment in default has been entered — Application for payment out of money in Court — "Any person" within r. 22(3) of Admiralty Procedure Rules — Whether includes "owner" — Stay of Order.

The point for decision in this case was whether the Court was prevented from making an order for payment out to the plaintiffs and the intervener from the fund in Court representing the proceeds of the sale by the marshal of the vessel L.S.T. "O. Sambaur" by reason of the fact that a person named Alexis Fournier des Corats resident in Phnom Penh, Cambodia, claiming to be the registered owner of the vessel had entered an appearance and a caveat after the plaintiffs have obtained judgment in an admiralty action *in rem* and after the arrest and sale of the said vessel.

Held: (1) the appearance entered on behalf of Alexis Fournier des Corats as registered owner of the vessel was not, in fact, an appearance since he had already ceased to be registered owner;

(2) a defendant is not entitled to appear as of right after judgment;

(3) an owner of a vessel is not entitled to enter a *caveat* against payment out as he is not "any person" within the meaning of the Admiralty Procedure Rules, r. 22(3).

A stay is not granted as a matter of course. There must be special reasons shown.

Cases referred to:—

(1) *The James W. Elwell* (1921) P. 351.

(2) *Howarth v. Howarth* (1884) 9 P.D. 218.

MOTION IN ADMIRALTY SUIT.

M. Karthigesu and *A. M. Ghows* for the plaintiffs.

T. G. Dunbar for the intervener.

C. H. Smith for the registered owner and caveator.

Cur. Adv. Vult

Whyatt C.J. : — The point for decision in these proceedings is whether the Court is prevented from